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IN THE

Supreme Court of the United States

October Term, 1958.

No. 472

JOSEPH W. BOWLEY,

Petitioner,

vs.

NEW JERSEY TURNPIKE AUTHORITY,

Respondent.

ANSWER OF THE RESPONDENT, NEW JERSEY TURNPIKE AUTHORITY.

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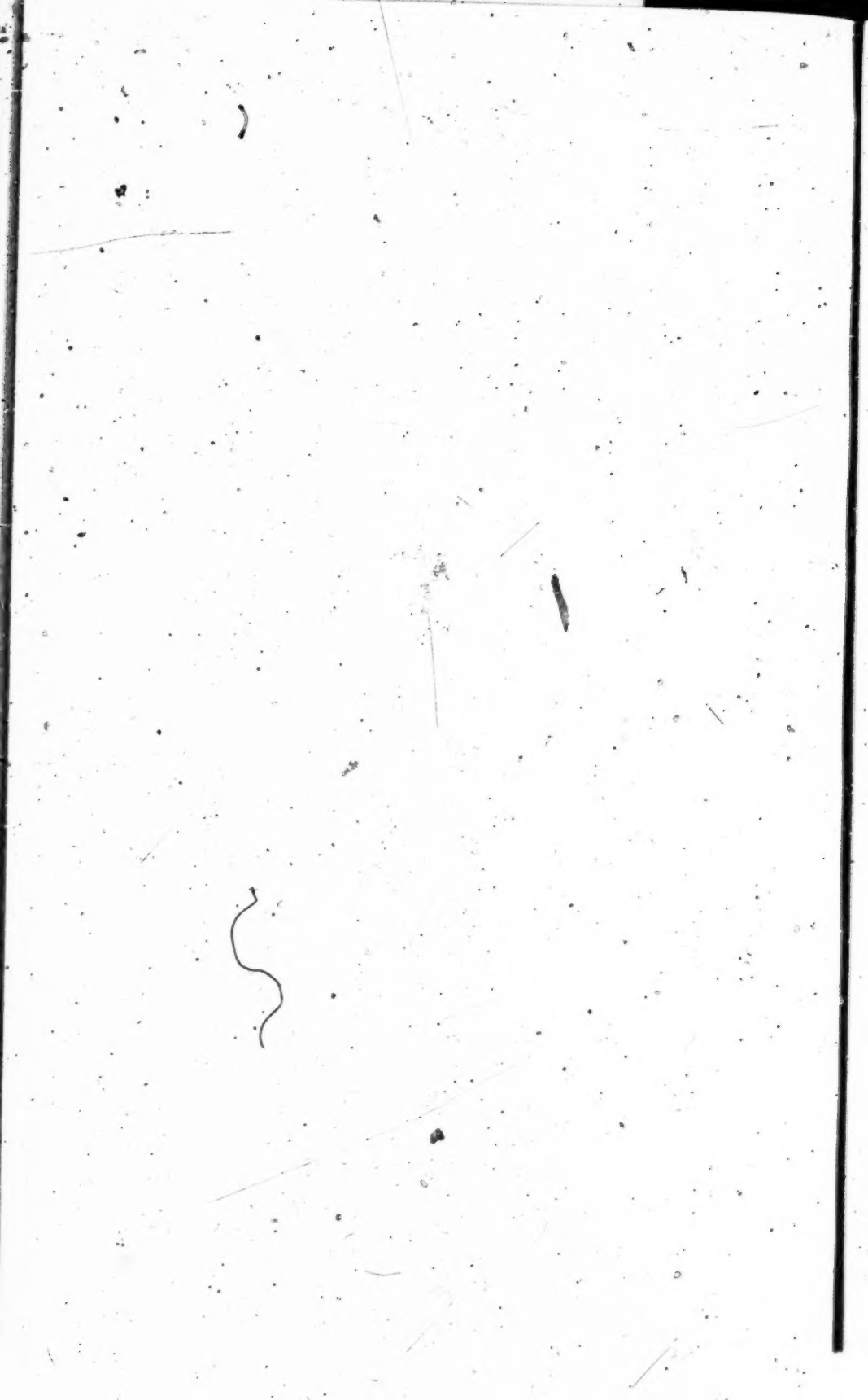

IN THE

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October Term, 1958.

No.

JOSEPH W. BOWLEY,

Petitioner,

vs.

NEW JERSEY TURNPIKE AUTHORITY,

Respondent.

ANSWER OF THE RESPONDENT, NEW JERSEY TURNPIKE AUTHORITY.

TO THE HONORABLE, THE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

The answer of New Jersey Turnpike Authority, respondent, to the petition of Joseph W. Bowley, of the City and County of Burlington, State of New Jersey, respectfully shows:

A.

That the petitioner is not entitled to the issuance of a writ of certiorari to the Supreme Court of New Jersey which entered a judgment on the opinion of Mr. Chief Justice Weintraub, a copy of which is appended hereto and which is reported in 27 N. J. 549. (Advance Sheet No. 31 of August 15, 1958) and 143 A. 2nd 558 (Advance Sheet No. 3 of August 23rd, 1958).

B.

The respondent denies all allegations set forth in paragraph B in the petition, except those allegations appearing on page 5 of the petition which are admitted.

C.

The questions presented for review are whether a property owner, in a condemnation action, is deprived of property without due process of law in violation of the 14th Amendment to the Constitution of the United States or has the obligations of a contract impaired by the passing of a law in violation of Section 10, Article I of the Constitution of the United States when

A. his expert witnesses testified as to the value of the property taken and as to the highest and best use of that property but his offer into evidence of a contract for the sale as a unit of all of his property together with other property owned by strangers was rejected

B. and when after a full hearing, out of the presence of the jury, the court excluded such agreement of sale as be-

ing conditional, contingent, speculative and without any reasonable probability of performance in the reasonably near future.

D.

Respondent concedes the allegations of Part D of the petition.

E.

COUNTER STATEMENT OF THE CASE.

On September 19, 1955 the New Jersey Turnpike Authority filed a declaration of taking of a portion of the lands owned by defendant Bowley in Florence Township, Burlington County, New Jersey, lying between, but not contiguous to, the Delaware River and Route 130. An appeal was taken by him from the award of the condemnation commissioners. At the hearing of that appeal before a jury in the Burlington County Court the defendant had Exhibit D-1 (D713a) marked for identification. The court refused to admit it in evidence and this appeal, in effect, is from that ruling.

The exhibit is an agreement of sale dated April 10, 1953 between Bowley and one T. P. Morgan, who did not testify, and who allegedly agreed to pay Bowley $5,000 an acre for a minimum of 400 acres of ground to be assembled by him within an area bounded by Schuyler's Ferry Road, River Road, the boundary line of lands owned by Florence Pipe and Foundry Company and Cedar Lane. (See Map, D720a.) The lands of Florence Pipe, not marked on the map are the blank areas extending from the River to Cedar Lane con-

stituting the entire land at the top of the Map, north of the lands the map delineates. The down payment was $1,000. Settlement was to take place within sixty days after the New Jersey Turnpike Authority officially declared the alignment of its Pennsylvania extension. The latter event happened on April 14, 1954 (D647a-5 to 33) so that the date of settlement became June 13, 1954. The agreement further provided that if the defendant could not assemble the acreage because of the Turnpike alignment the down payment was to be returned and Bowley released.

Bowley obligated himself by the agreement, D-1 to sell the entire acreage set forth in two deeds recorded on October 24, 1952, in Book 1136, p. 269 and Book 1136, p. 267 respectively, known as the Simpkins Farms. They were all the lands he owned in the area of the proposed assemblage on that date. He had, however, already conveyed 130.021 acres of these lands to Markheim (Exhibit P-30, P11a) and had contracted to sell Markheim more if the final alignment of the Turnpike placed the southwesterly line of the right of way more northerly than it had been described in the deed to Markheim (Exhibit D-10, P1a). Counsel for Bowley stipulated that the Court could assume for the purposes of this case that neither Bowley nor Morgan could get "one square foot of land" from the Manor Real Estate Company (D427a-29).

Bowley knew prior to April 10, 1953, date of D-1 for identification, that his lands were to be severed by the Turnpike Extension, even though he did not know exactly where (D321a-20 to 27; D340a-1 to D341a-26). At the time Bowley acquired the Simpkins Farm he sold lands the same day to Markheim with reference to a proposed right of way to the Turnpike (Exhibit P-30, P11a) and entered into the agreement for an adjustment of acreage with Markheim to take place upon the Turnpike's final alignment (Exhibit D-10, P1a). He read this deed and agreement (D609a-14); he

understood what they said (D609a-18); and he saw the map made by Wills for Markheim from which the description was prepared (D609a-24 to 40) and which showed the Turnpike alignment. All of this occurred in October, 1952, long before the agreement of sale was executed. He knew at the time the Turnpike was going somewhere on his property (D341a-3 to 14). The Exhibit D-13 from Sutton to Bowley (D711a), undated but carrying a settlement date of October 1, 1955 which he testified extended agreements going back as far as 1952 (D608a-5 to 33) is additional proof that he knew of the Turnpike alignment when he entered into the agreement D-1 to perform what he should then have known was an impossibility. This general base line for the location of the Turnpike was never changed (D628a-12, 13).

Defendant made formal proof of the execution of the agreement and then offered it in evidence to prove the value of the lands (D416a-15 to 16); their adaptability for use as a portion of an assemblage of lands (D425a-20 to 25); the plan of defendant to make such an assemblage; the value of the lands in 1953 as part of that plan and the frustration of the plan by the Turnpike (D428a-28 to 34). Defendant expressly stated that the purpose of the offer was not to seek compensation for the loss of the contract (D428a-23 to 26), but contended the Turnpike's action would impair the contract (D416a-3 to 11). Plaintiff objected to the offer on the ground that the contract and the assemblage were speculative and not reasonably probable of fulfillment in the near future (D414a-22 to D415a-38).

At that stage of the proceeding the proofs then in evidence showed that defendant Bowley had initially acquired title to his lands on October 24, 1952 by two deeds, conveying a tract known as the "Simpkins Farm". On the same day, by Exhibit P-30 (P11a), he conveyed to Markheim-Chalmers-Ludington, Inc. all the portion of the lands he

had just acquired; lying to the southwest of the proposed southwesterly line of the Turnpike extension, which line is the most northerly line outlined in red on Exhibit P-54 (P15a) bearing the names "Markheim-Chalmers and Ludington" along the westerly end.

This conveyance transferred 130.021 acres but on the same day the parties, recognizing that the Turnpike alignment was not final, by Exhibit D-10 (P1a) agreed to an adjustment in price if the shift in the alignment chosen as a boundary resulted in encompassing more or less than 130.021 acres in the grant to Markheim.

This agreement was fulfilled on August 17, 1955 by the reconveyance to Bowley of the portions north of the final Turnpike Alignment (Exhibit D-12, P3a), so that on the day of taking Bowley owned a total of 204.15 acres (D5a-5).

The agreement D-1 had specifically mentioned that the lands to be delivered under it might include the "Marter" tract which lay within the area the agreement outlined. On August 5, 1953 Bowley acquired the Marter tract of 45 acres (D69a-6 to 11) and on May 27, 1955 conveyed it, not to Morgan, but to Markheim (D342a-1 to 4).

Experts had testified on both sides that the highest and best use of the land was for light industry (D24a-28) or heavy industry (D484a-18), and that industry required minimum assemblages of 100 acres each.

There was evidence of the surroundings of the Bowley tract and the value of industrial assemblages in the vicinity and the prices paid for lands acquired for such assemblages and prices for which assembled tracts sold, treated in detail under Section G, Point I (a) of this brief. Specifically, during the years 1951 and 1952, the Manor Real Estate Company, a wholly owned subsidiary of the Pennsylvania Railroad Company, made an assemblage southwest of the proposed line of the New Jersey Turnpike consisting of 958.449 acres at an average cost of $1,190 per acre (D136a-33

to 38). In making their assemblage they also acquired approximately 2719.02 feet of river frontage on the Delaware River. Before sale or lease the Pennsylvania Railroad Company constructed a spur to service the Manor assemblage, 10,400 feet in length (D139a-19, 22; D224a-21).

The Manor Real Estate Company thereafter transferred two pieces of its assemblage by a sale to the National Gypsum Company and a lease with option to buy with the Barium Steel Corporation. The sale to National Gypsum Company was on the basis of $3,500 per acre (D137a-33), which included 872.87 feet of water frontage (D138a-32). The cost per acre to Barium under the first option of the agreement is $2,606 per acre if purchased within one year of its effective date; and the second option is $2,875 per acre if purchased within three years of its effective date, for the first 500 acres, and an option of $2,350 per acre in the event they desire to take the remainder of the assemblage consisting of 361 acres (Exhibit P-42, D714a). The Bowley land had no railroad service or river frontage (D196a-28 to 40).

With the proofs in this posture and with the offer and objection before him the Court decided to take proof out of the hearing of the jury to assist him in determining the admissibility of the agreement D-1 (D587a-39 to D588a-27), and that testimony is summarized in respondent's argument hereinafter set forth.

ARGUMENT.

Point I.

The exclusion of the contract from evidence did not take petitioner's property or impair the obligation of his contract in violation of the Constitution of the United States.

A.

Since the contract was not appropriated or impaired by the taking, petitioner is entitled only to that compensation which is just compensation, having in view the highest and best use that might be made of it in the foreseeable future.

The claim of petitioner, under point C, Page 6, that exclusion of the contract from evidence constituted a taking of it or an impairment of its obligation is somewhat at variance with his statement to the trial court at the time it was offered. He then said:

> "Now, we must remember this, that it is not my contention that simply because the contract goes into evidence, that the jury is to compensate Dr. Bowley for the loss of the contract. That is not my theory at all" (D428a-28).

Consequently, there having been no offer to show a taking or impairment of the contract, but merely mention of it in the course of argument the trial court had no chance to rule on this point and, to the contrary, was told that such was not the issue.

The general rule is that matters not placed in issue at the trial, including Constitutional questions, with the exception of matters of jurisdiction or public policy, will not be considered on appeal. *Roberts Electric Inc. vs. Foundation & Excavations, Inc.*, 5 N. J. 426, 431 (1950); *Sustick vs. Slatina*, 48 N. J. Super. 134, 141 (App. Div. 1957); *Apex Metal Stamping Co. vs. Alexander & Sawyer, Inc.*, 48 N. J. Super. 476, 483 (App. Div. 1958). At least the issue was not clear cut.

Text writers and courts alike recognize that there is a distinction between the "frustration" of a contract by reason of exercise of the sovereign power and an appropriation or impairment of the contract. Just compensation is only required if the taking falls into the second group. The principles to be derived from reported decisions on this point are summarized in the following excerpt from *Jahr, Eminent Domain*, Section 117, p. 157:

> "It frequently occurs that the taking of private property results in the owner's inability to perform certain profitable contracts for which the owner suffers a loss or damage. While the general rule is that no compensation is paid for such losses, there are cases in which the owner is held to be entitled to an award for such damage. These cases usually fall into two groups."
>
> "In the first group the taker does not acquire the outstanding contract but merely the property which has the effect of rendering performance impossible. The contract there is said to be frustrated by an act of the state. The contract is not being taken, hence there can be no compensation." (Citing *Omnia Commercial Co. vs. U. S.*, 261 U. S. 502, 43 S. Ct. 437; 67 L. ed. 773; *Mullen Benevolent Corp. vs. U. S.*, 290 U. S. 89; 54 S. Ct. 38, 78 L. ed. 192.)
>
> "The second group comprises those cases where the

taker acquires the property as well as the right to the performance of the contract in which event there is a taking and compensation must be provided."

The effect here, insofar as it interfered with performance of the contract was a "frustration", and falls within the first group described in the quotation. Our Courts, Federal and State, have recognized and applied the rule. *U. S. ex rel. T. V. A. vs. Powelson*, 319 U. S. 266, 282; 87 L. ed. 1391, 1401; *City of Trenton vs. Lenzner*, 16 N. J. 465, 476 (1954); *N. J. Highway Authority vs. Rue*, 41 Super. 385, 388 (App. Div. 1956).

Cincinnati vs. Louisville & Nashville Railroad Company cited by defendant at page 16, line 9, dealt with the taking of a contract, not frustration of a contract and is not in point. Every taking interferes with uses to which lands may be put even where the taking may make impossible performance of contracts requiring the lands to carry out the contract. When the contract or use is not speculative it is considered in determining market value and compensation made. *N. J. Highway Authority vs. Rue*, 41 N. J. Super. 385, 387 (App. Div. 1956), involved the taking of land and makes a distinction between cases in which the frustration of a business can be considered as an element of damages and cases where it cannot and makes the turning point of the distinction the speculative or non-speculative nature of the business. See also *City of Trenton vs. Lenzner*, 16 N. J. 465, 476. In many cases set out in that opinion the injury to the business damaged contracts made in connection with the business. See also *McGovern vs. City of New York*, 229 U. S. 372; 33 S. Ct. 876, 57 L. ed. 1228, 1232.

In the case at bar since the contract itself was not appropriated to the public use, the only compensation that the constitution required be made to prevent the condemna-

tion constituting a taking or impairment of the contract was just compensation for the land having in view the highest and best use that might be made of it in the foreseeable future.

B.

Petitioner was not deprived of showing the highest and best use of his land by the exclusion of D-1, which if error, is not reversible error.

The refusal to admit D-1 (D713a) in evidence did not deprive petitioner of the opportunity to show the highest and best use of his land. If the highest and best use that could be made of the land was as a constituent part of a specific assemblage of 400 acres within definite boundaries accomplished by a day certain, for the purpose of sale to T. P. Morgan at $5,000 an acre as D-1 provides, then defendant was certainly, and properly, deprived of the chance to show the highest and best use.

If, however, as his experts testified, the highest and best use was as an assemblage for industrial use, then the record refutes his contention for it is replete with testimony that such was its best use, that assemblages of that type had been successfully made adjoining his parcel and successfully sold; that prior to the condemnation of his land was large enough to fulfill such a use and after its division by the Turnpike the resulting parcels were too small to satisfy the requirements of industry. This testimony is augmented with recitals of prices paid to effect such an assemblage and examples of recent sales of such assembled ground and the price at which assemblages sold, which, in most cases exceeded the price set out in D-1. The importance to the success of such an enterprise of river front ownership and

railroad access and the feasibility of obtaining both were disclosed to the jury. The demand for such acreage was detailed by both sides.

The specific testimony on these points appear as follows: The highest and best use is as a site for industry (D196a-23 to D197a-10; D205a-2 and 3; D366a-12; D484a-18 to D485a-8); assembled ground has a greater value for this use than isolated parcels (D267a-12 to 21) and the minimum assemblage acceptable to industry is 100 acres (D250a-22 to 25); the Bowley tract was large enough for industrial use before being divided by the Turnpike extension (D484a-26 to D485a-8). The possibility of assembling it with other ground, now separated from it by the Turnpike, existed before the taking (D285a-11 to 31) and this possibility included making an assemblage that would give the river frontage so important to industrial development (D526a-37 to D527a-24). The prices paid for lands for industrial assemblages adjoining the Bowley tract were given in detail (D95a-11 to D136a-38), as well as the prices at which it sold (D136a-39 to D137a-35; D499a-24 to D519a). Specifically, to refer to just one expert, those prices were: 68 acres sold at $7,801 per acre (D500a-25 to 29); 15.85 acres at $13,678 an acre (D505a-22 to 25) and some at $5,100 an acre (D514a-12). All experts agreed that there was a demand for such property (D265a-12 to 15; D483a-17 to D485a-6). Considering all of these elements one of the defendant's experts stated that in his opinion the value of the land taken was $4,575 per acre and damage to the remainder was $2,745 per acre (D529a-12 and 20).

It cannot be said therefore that defendant was deprived of the opportunity to show the highest and best use of his land, if that use was, as all experts agreed, for industry and enhanced in value if assembled with other lands. Indirectly, he was not even deprived of placing before the jury the very agreement D-1 as a basis for an opinion as to its

effect on the value of the lands when devoted to industrial use. Asked if it would have made any difference in his opinion if he had known of the particulars of D-1, which were first detailed to him the witness said he knew of the agreement and said it would not alter his opinion of the market value (D287a-7 to 14; D293a-22 to D294a-13).

Since all the experts testified that the highest and best use of the petitioner's land was for industry, and since the petitioner's own expert witness testified that having knowledge of the agreement it would not alter his opinion of the market value of petitioner's land, it would seem to follow that the price of $5,000 per acre which the petitioner seeks to present before the jury is a unique price reflecting that price which a unique buyer would pay. The record indicates the price is more than $400 per acre in excess of the market value testified by the petitioner's own experts if the land were used for its highest and best use, and as such the contract should not be admissible since as stated in the preceding point, the respondent is not acquiring the right to the performance of the contract. It is axiomatic that the price a unique buyer is willing to pay does not come within the definition of "just compensation", it is not ". . . a sum of money which fairly represents the transferable value of the property in the market place." *State Highway Com'r vs. Burnett*, 24 N. J. 280 (S. Ct. 1957).

An isolated bit of evidence is a premise which in combination with other premises leads to a conclusion; it is part of a syllogism. It is an axiom of the science of logic, as true today as it was in the time of Aristotle, that a conclusion can rise no higher than the premises from which it is derived. The conclusion sought in this case was that the market value of the Bowley tract on the day of taking was the value derived from its highest and best use; an assemblage for industrial purposes. If the conclusion can be barred from evidence when its attainment is purely speculative,

then certainly the evidence infected with that fault can be barred so that the conclusion will not be tainted with speculation. And so it was competent for the Court to take testimony and finding the agreement to be speculative and probability of performance in the near future lacking, to refuse to admit it as evidence tending to corroborate the experts' opinion. That there was evidence to show its speculative nature is developed under the succeeding point.

But if it be assumed for the moment that the agreement was not speculative and that the Court erred, still in view of the mass of other evidence before the jury in proof of this concept of the highest and best use of the land, the exclusion would not be prejudicial if the purpose of the offer was to show value as an industrial assemblage. See *U. S. vs. Certain Parcels of Land*, 144 F. 2nd 626 (3 C. C. A. 1944) where the Court stated that Pennsylvania excludes evidence of sale of the very property condemned and that "market value" in this type of case depends upon the judgment of the community rather than of a particular buyer and seller. Viewed in the light of the evidence detailed above the agreement could not have had a substantial influence on the verdict since it was not only merely corroborative of what the jury had been told, but in fact diluted what they had been told, for in demanding that the assemblage be made in a more limited area and time than the other evidence showed was required, it imposed harsher restrictions on the realization of the use than the experts considered necessary.

Exclusion of merely cumulative evidence of this nature cannot be said to have been "inconsistent with substantial justice", *Maccia vs. Tynes*, 39 N. J. Super. 1, 11 (App. Div. 1956).

Point II.

The agreement of sale between Bowley and Morgan was properly excluded as evidence of the highest and best use of the Bowley property because there was no reasonable probability of performance in the reasonably near future.

A.

The evidence received by the Court showed no reasonable probability of fulfillment of the agreement.

There was ample evidence from which the judge could reasonably conclude that the Bowley-Morgan agreement of April 10, 1953, Exhibit D-1 for identification could not, within reasonable probabilities, have been fulfilled. The evidence submitted on this question appears at D587a-29 to D616a-39; from D617a-30 to D668a-4.

It was apparent that Bowley could not perform his agreement from the outset. Bowley obligated himself by the agreement D-1 to sell the entire acreage set forth in two deeds recorded on October 24, 1952, in Book 1136, p. 269, and Book 1136, p. 267 respectively, known as the Simpkins Farms. They were all the lands he owned in the area of the proposed assemblage on that date. He had, however, already conveyed 130.021 acres of these lands to Markheim (Exhibit P-30, P11a) and had contracted to sell Markheim more if the final alignment of the Turnpike placed the southwesterly line of the right of way more northerly than it had been described in the deed to Markheim (Exhibit D-10, P1a). Counsel for Bowley stipulated that the Court could assume for the purposes of this case that neither Bowley nor Morgan could get "one square foot of land" from

the Manor Real Estate Company (D427a-29). It is therefore quite evident that from the very outset Bowley could not deliver the full acreage of the Simpkins Farms as he had agreed to do. Nothing in the record indicates whether the grantee was aware of this or whether he would waive his right to insist that Bowley deliver all of the Simpkins Farms which the agreement specified was to be part of the assemblage. While it may be argued that a proper interpretation of the agreement would construe it to mean that only that part of the Simpkins Tract north of the Turnpike was intended, Morgan was not present or a party to the suit and not only might insist that his bargain included all of the Simpkins Farms but also that the agreement meant that he was to receive 400 acres in addition to the farm and the agreement is so worded as to invite that construction for the assemblage is mentioned separately from the farm conveyance. These ambiguities could not be resolved without affording Morgan a hearing and he was neither a party nor present (D610a-18 to 21).

Bowley knew prior to April 10, 1953, date of D-1 for identification, that his lands were to be severed by the Turnpike Extension, even though he did not know exactly where (D321a-20 to 27; D340a-1 to D341a-26). At that time Bowley acquired the Simpkins Farm he sold lands the same day to Markheim with reference to a proposed right of way to the Turnpike (Exhibit P-30, P11a) and entered into the agreement for an adjustment of acreage with Markheim to take place upon the Turnpike's final alignment (Exhibit D-10, P1a). He read this deed and agreement (D609a-14); he understood what they said (D609a-18), and he saw the map made by Wills for Markheim from which the description was prepared (D609a-24 to 40) and which showed the Turnpike alignment. All of this occurred in October, 1952, long before the agreement of sale was executed. He knew at the time the Turnpike was going somewhere on his prop-

erty (D341a-3 to 14). The Exhibit D-13 from Sutton to Bowley (D711a), undated but carrying a settlement date of October 1, 1955 which he testified extended agreements going back as far as 1952 (D608a-6 to 33) is additional proof that he knew of the Turnpike alignment when he entered into the agreement D-1 to perform what he should then have known was an impossibility. This general base line for the location of the Turnpike was never changed (D628a-12, 13).

With Bowley's keen interest in everything pertaining to the Turnpike, it is hard to believe that he did not know where it was to be located until September 1955.

Any severance of his property by the alignment of the Turnpike, even near the southern boundary, made it improbable, if not impossible, to create an assemblage that would conform to the requirements of the agreement. Nonetheless, all the way Bowley sought and wanted the alignment of the Turnpike to the north along the line of lands of the Florence Foundry (D660a-13-14). If the Turnpike was so located, Bowley by the terms of Exhibit D-10, would have been obligated to sell most of the remainder of his lands to Markheim and thereby further reduce his chances of creating the assemblage. Such activity scarcely accords with a bona fide attempt to increase his holdings.

The agreement provided that the assemblage of 400 acres must be within the bounds of Schuyler's Ferry Road, River Road, Florence Pipe & Foundry property line, and Cedar Lane. All such acreage available, in tabular form, show the total to be 518.20 acres.

Bowley property at time of taking	204.15
Bauer property	28.82
Sutton Estate	145.78
Scott	12.21
Hays	33.87
Laumaster & Wright	21.29
Hull	5.00
Hydraulic Fill (outside agreement limits)	22.08
Marter	45.00
	518.20

This acreage includes all the lands within the limited area prescribed in the contract except the lands conveyed to Markheim or Manor, which admittedly they could not get (D427a-29 to 35). In fact, the 22.08 acres designated above as Hydraulic Fill lands were outside River Road and therefore not within the prescribed limits and could not be used to fulfill the contract.

It should also be noted that of the 204.15 acres held by Bowley at the time of the taking, he only acquired title to 27.154 acres on August 19, 1955 (Exhibit D-12, P3a). Deduct these and Hydraulic Fill 22.08, total 49.234, from the above total of 518.20 and irrespective of the final alignment of the Turnpike the available acreage would be 468.966. Reference to the Map (D720a) shows that counting the acreage embraced only within the larger parcels lying within the Turnpike main right of way a total of 72.13 acres would be taken by the road no matter where it was placed and since it was straight and the lands it bisected irregular in boundary more acreage necessarily would be isolated to the south no matter where it was located. It is clear therefore that with this amount of available acreage any severance of the Bowley lands or the lands within the assemblage area, no matter where it was, resulted in making

Bowley's performance under the contract impossible, a fact we have shown above, he knew before the agreement was made.

We have listed his testimony as it relates to each of the parcels that were available in the order of their appearance in the table of such lands set out above.

Bauer Property (28.82 acres)

This parcel was owned by four persons: Wilmer Bauer, his wife, Alice; Walter W. Bauer and his wife Anna (D615a-12 to 15). Wilmer purported, although none was clearly, to represent all the owners (D615a-21 to 35). There were "conversations" between him and Dr. Bowley, initiated by Wilmer (D615a-38). These "conversations" extended from 1953 to 1955 (D597a-36, 37). They never reached any written agreement (D616a-1, 2) and, indeed, the record doesn't indicate they even reached a verbal agreement or were ever close to it or that any price was discussed or that the three other owners subscribed to Wilmer's representation of them.

Sutton Estate (145.78 acres)

Because of its size, this was one of the most important parcels, although the failure to acquire any of the parcels would have been fatal to the scheme. Presumably this tract was owned by Ernest Sutton, his wife and sister, but Bowley's conversations were only with Ernest (D594a-24 to 31). These discussions started in 1953, two months before the Morgan agreement D-1 and continued on and on (D595a-13 to D596a-11). No agreement was ever reached except Exhibit D-13 (D711a) which was an extension of a prior agree-

ment or agreements which could have gone back as far as 1952-1953 (D608a). This agreement obviously was prepared from a map conforming to the ultimate location of the New Jersey Turnpike. (See Strip Map Exhibit D720a). Tract #1 in the agreement describes Parcel 5A, Tract #2 is composed of Parcel 5B, Tract #3 is Parcel 5C, and Tract #4 appears to be the part marked A. R. L. S. on the north side of the Turnpike right of way. It is a contract for the sale of the lands to be taken by the Turnpike from Sutton plus the A. R. L. S. piece, which would be land-locked on the northside of the Turnpike. This agreement could not possibly be in furtherance of a plan to create an assemblage.

A careful study of Exhibit D-13 and the strip map is also illuminating in connection with Bowley's claim that he had no knowledge of the alignment of the Turnpike Extension until the formal taking, particularly in view of his testimony that Exhibit D-13 was an extension of prior agreements. Bowley's uncertainty with respect to the origin of the description is equally enlightening (D607a-1 to D610a-11).

Defendant, to further support his position produced Exhibit D-14A for identification, an assignment by Sutton heirs to Bowley of their rights to acquire lands below high water mark adjoining the Sutton Estate, which assignment was acknowledged May 25, 1955 (D589a); Exhibit D-14D for identification, right of way agreement with Sutton Estate dated June 2, 1955; Exhibit D-14E for identification, letter from the Department of Conservation and Development dated June 14, 1957. These transactions not only took place a year or more after the agreed settlement date of the Morgan agreement, but referred to lands that were beyond the outbounds of the area to which the assemblage was limited.

Consequently, his efforts of two years with respect to this tract of 145.78 acres, so important to his plan had produced an agreement of sale, agreeing to sell a total of only 11.04 acres (Exhibit D-13; D711a), described according to the

Turnpike map and shown to be lands either to be taken by the Turnpike or to lie to the north and apart from the assemblage he wanted to make.

Scott (12.21 acres)

The Scott property appears to have been owned by a Nancy and Helen Scott but Nancy was dead and defendant conversed with a woman he believed to be her daughter, presumably over the same period covered by the Sutton discussions, and also to an attorney apparently representing some or all of the Scotts. An agreement of sale (Ex. D-18, D711a) was prepared but never signed (D596a-30 to D587a-29). Even Bowley did not sign it (D604a-9) nor make a down payment (D603a-38).

This agreement (Ex. D-18, D711a) was dated "1955" but settlement was not to be until January 25, 1956 long after the time for performance of D-1 (June 13, 1954) had passed.

Hays (33.87 acres) and *Laumeister & Wright* (21.29 acres)

The Hays heirs claimed title by adverse possession to the Laumeister & Wright tract and a suit to quiet title was still pending at the time of the hearing. Insofar as that 21.29 acres is concerned, the relevancy of his arrangements with the Hays heirs to the probability of acquiring that acreage depended on the outcome of the suit (D642a-1 to 5).

The Hays parcel of 33.87 acres was owned by nine heirs (D642a-7 to 9). Seven of the nine were represented by Powell & Davis, one by Henry Hartman, Esq., and one by John S. Conroy, Esq. and the heirs all desired to sell the property (D642a-12 to 19).

Bowley had negotiated for the property from about 1952,

or prior to the Morgan agreement, down to September 19, 1955 and the date of taking, a period of three years (D599a-30 to D602a-16). General Powell's records indicated that Bowley conferred with him presumably the first time on October 29, 1954, with respect to the Hays Estate, as this is the earliest record of any conversations in his files. On January 25, 1955, General Powell wrote all the heirs, or their attorney, advising that Bowley had offered $75,000 for the Hays property. His records also showed that on January 31, 1955, he gave Bowley a receipt for $7500; and that Anna Rainier on that date acknowledged receipt of General Powell's letter of January 25, 1955, and accepted as far as she was concerned the Bowley offer. As of the time of trial only one acceptance was received from the seven heirs represented by General Powell. (D643a-30 to D644a-5). Apparently no acceptance was received from John S. Conroy, 3rd, Esquire, for his client Johnson; and Bowley admittedly was having trouble with the ninth heir, Lambert Rainier (D613a-25).

Here, again a written contract was prepared on December 15, 1954 but executed by no one (D711a; Ex. D-17).

Hull (5 acres)

Dr. Bowley testified that he had an "understanding" with these people for the purchase of their 5 acres (D598a-36 to D599a-1) but no written contract (D606a-2 to 9).

Hydraulic Fill (22.08 acres)

This property was not within the bounds prescribed by the agreement and could constitute no part of the assemblage.

Marter (45 acres)

This piece is shaped like an inverted pan, located south of the Sutton tract and north of Schuyler's Ferry Road (Map P-45, D719a), separated from the rest of the potential assemblage by the Markheim tract and the Cucinotta piece owned by Markheim (D342a-10 to 30, D344a-34 to 35). Markheim land could not be acquired. Its utility to the assemblage depended therefore upon the possibility of first acquiring the Sutton tract, detailed above. Bowley bought on August 5, 1953 and sold it to Markheim May 27, 1955, before the taking (D342a-1 to 4). From the fact that the portion of the Simpkins tract consisting of 130 acres sold to Markheim by Bowley before the agreement was executed and described as lying south of the proposed Turnpike in that deed (Ex. D-30), is farther north than the Marter tract, as Exhibit at D720a indicates, it is apparent that Bowley knew it could not form part of his assemblage before the agreement D-1 was entered into.

The execution of the agreement itself was rather unusual. The witness and typist was Bowley's sister (D411a-29). She had come all the way from Wilmington, Delaware in response to a telephone call from him (D412a-22). She had not known of the purpose of her visit until she arrived (D412a-32); she prepared the agreement at Bowley's instruction in his office (D412a-1), attested it and immediately returned to Wilmington (D412a-20).

The purchaser, T. P. Morgan, was not produced at the hearing (D610a-13 to 28). Consequently, other than the statements by Dr. Bowley that the purchaser was a nationally known racing figure (D610a-8 to D611a-6) and that he "knew his sources" in answer to the question as to whether or not he had made an investigation to see whether the purchaser could raise the $2,000,000 required to conclude the transaction (D611a-34 to D612a-5) there was no testimony

that Morgan could have fulfilled his agreement and no opportunity by plaintiff to cross-examine him as to his motives for entering into the agreement or the considerations involved in setting the price.

The down payment was a strictly cash transaction (D612a-6 to 21) and Dr. Bowley had no records of the transaction because he kept no records (D612a-37 to D614a-13).

Following the testimony last referred to, Dr. Bowley, who was certainly the one best able to know whether or not his transaction was speculative, characterized it as "a gamble". In view of his characterization of himself at that point as a "horse man" it may be assumed that he used the term as a term of art. The court felt the same way about the transaction and based on the foregoing testimony regarded it as speculative and within the rule of the cases cited above banning evidence of future uses which are not within the realm of probability (D614a-11 to 19).

Further evidence that the agreement was not competent proof of the fair market value of Dr. Bowley's land on the day of the taking appears at D663a-31 to D664a-4. He states that the Sutton tract was a "squeeze deal". Suttons wanted $7500 an acre, he was willing to go as high as $8,000 to $10,000 in order to secure the acreage for the assemblage. This tract of 145 acres was the second largest tract involved and was absolutely essential to complete the assemblage. It is clear that he had to pay the price he was willing to pay for lands to be sold at one-half that price, the value of the lands he already had would be materially reduced.

Contrasting the price reserved in the agreement with the price of $3500 Manor Real Estate Company had received from National Gypsum for an acre of ground with 872.87 feet of water frontage (D138a-32) and the price reserved in the lease with Barium Steel Corporation ranging from $2350 to $2875 an acre for lands with 1845.15 feet of water frontage, both of which tracts were served by a railroad spur that

the Manor Real Estate Company had been required to construct at a cost of $14.50 a lineal foot for 10,400 feet, it is apparent that the price set out in the Bowley agreement was not realistic.

While the printed words making time of the essence in the agreement D-1 have been lined out, the Courts have held that, at law, time is of the essence of a contract for the sale of lands. *Earlin vs. Mors*, 1 N. J. 336, 340 (1949). Even in Chancery time may be of the essence because of the nature of the transaction. *Grigg vs. Landis*, 21 N. J. Eq. 494 (E. & A. 1870); *Cramwell vs. Clinton Realty Co.*, 67 N. J. Eq. 540 (Ch. 1904). The time for performance of this contract had elapsed long before the Turnpike taking, and in view of the foregoing rules the contract itself may have become void, a circumstance increasing its speculative nature.

Attention is directed to *Stamato vs. Agamie*, 24 N. J. 309 (1957). Specific performance was asked in that case of an agreement of sale contingent upon seller's acquisition of other lands and their rezoning. The memorandum did not state that time was of the essence, but the Court held:

> "And where the obligation in the contract is essentially unilateral, as here, in the sense that plaintiff had an escape if the property should not be rezoned or if he should fail to acquire the acreage of the third person, delay is viewed with special strictness. *Meidling vs. Trefz*, supra (48 N. J. Eq., at page 643); *Moran vs. Fifteenth Ward B. & L. Assn.*, 131 N. J. Eq. 361, 363 (Ch. 1942); *Fry, Specific Performance* (6th ed. 1921), Section 1103, p. 515; *Pomeroy, Specific Performance* (3rd ed. 1926), Section 387-8, p. 821. It would be unreasonable to find that the party who alone is fully committed agreed to be bound interminably, and hence in these circumstances the agreed time limitations are more meaningful than in situations in which the obligations

are bilaterally firm. Especially is this true when there is absent any element of forfeiture of a partial performance. Cf. 3 Corbin, Contracts (1951), Section 714, p. 800."

In the light of all the testimony that was taken, the least that can be said is that there was certainly evidence from which a reasonable man could conclude that the contract was speculative and not probable of fulfillment in the near future.

B.

The agreement was in its essentials merely an offer and consequently no evidence of value.

Attention is directed to the cases collected in 155 A. L. R. 262 following the report of *United States vs. Certain Parcels of Land*, at page 253 (144 Fed. 2d 626, 3 C. C. A. 1944). While these cases for the most part regard an agreement of sale for the identical land involved in the condemnation, unconsummated on the day of taking as evidence admissible on the question of value they are clearly distinguishable from the contract that was offered in the case at bar. Our Courts have consistently refused to permit a condemnation defendant to give evidence of offers or options received for the purchase of his land. The authorities are set out in the case of *In re Port of New York Authority*, 28 N. J. Super. 575, 583 (App. Div. 1953).

Petitioner cites *Currie vs. Waverly and Central Railroad Company*, 52 N. J. L. 381 (E. & A. 1890), in support of its argument that the enhanced market value of petitioner's land due to its adaptability for valuable purposes in connection with other properties may be shown. However, it

should be noted that the taking involved in this case was by a railroad company, i. e., a quasi public use and the Court said "the rule of law applicable to condemnation of land to these quasi public uses is that its owner shall be given by way of compensation for his land its fair price for any use for which it has a commercial value of its own in the immediate present or reasonable anticipation in the near future. It is for the owner's deprivation of any existing value that he is to be compensated."

Offers are not rejected as evidence merely because they are called "offers" any more than agreements of sale are received in evidence simply because they are "agreements". The reasons for the rejection of an offer are found in the uncertainties inherent in offers or options. *The Port of New York Authority* case, supra, states that the reasons for excluding offers are expounded in *Sharp vs. United States*, 191 U. S. 341, 24 S. Ct. 114, 48 L. ed. 211 (1903), and in *Erceg vs. Fairbanks Exploration Co.*, 95 Fed. 2d 850 (9 C. C. A. 1938). Examination of the *Sharp* case indicates that among other infirmities present in an offer are these: (L. ed., page 213). It is a form of indirect evidence of the opinion of the person making the offer as to the value of the land; the offerer may have wanted the land for some particular purpose disconnected from its value; poor speculation may have induced it; there is no opportunity to cross-examine the person making the offer to show these various facts.

Even in jurisdictions where offers may be shown the test is the offer must be made in good faith by a man of good judgment acquainted with the value of real estate and of sufficient ability to pay. It must be for cash and not for credit or in exchange and it must be determined whether it is made in reference to fair cash market value of the property or to supply a particular need or fancy. *City of Chicago vs. Harrison Halstead Building Corporation*, 143 N. E. 2d 40 (Ill. S. Ct. 1957).

The agreement in question was subject to these defects.

Like an offer, Dr. Bowley was free to perform or not perform the contract at his will for it provided for his complete release if he was unable to complete the assemblage and consequently; he could terminate it by deliberate fruitless activity. Morgan, the other party, was not produced so he could be cross-examined as to his ability to perform and to find out what weighed most heavily in determining the price he had offered: the making of the assemblages or the making of the assemblage by the time for performance set out in the agreement. Without an answer to this latter question, the agreement could afford no indication of the value of the land to T. P. Morgan if the assemblage had been completed by the day of settlement, long prior to the day of taking. Considering these things, the agreement is subject to the same criticisms that bar an offer as evidence of value and is replete with the "special circumstances" which if present, bar evidence of sales to the owner. *New Jersey Highway Authority vs. Rudd*, 36 N. J. Super. 1, 5 (App. Div. 1955):

> "Where the evidence of sale to the owner presents requisite essentials and is not destitute of probative worth because of special circumstances, it is admissible."

The Courts have not been uniform in admitting agreements of sale into evidence and they were rejected in the following cases: *Crystal Lake Park District vs: Consumers Co.*, 313 Ill. 395, 404, 145 N. E. 215 (1924); *Suburban Land Co. vs. Arlington*, 219 Mass. 539, 107 N. E. 432 (1914); *Matter of Simmons*, 68 Misc. Rep. 65, 124 N. Y. S. 744 (1910); *Ottawa, etc., R. R. Co. vs. Adolph*, 41 Kansas 600, 601, 21 P. 643 (1889). See *Currie vs. Waverly and Central Railroad Company*, 52 N. J. L. 381 (E. & A. 1890), where the Court said proof of the price at which ". . . a stranger to this record had offered to sell to another stranger a piece of land

belonging to yet a third stranger but adjoining tract in question . . ." was clearly incompetent.

It would therefore seem that where the agreement of sale is an unconditional one requiring nothing but the payment of the price and the conveyance of the title to consummate it, and is recent in time it may be received as evidence of value, but where the agreement is terminable at the will of either party and depends for its fulfillment on conditions that may or may not be met, it is objectionable for the same reason that offers are rejected.

CONCLUSION.

It should always be borne in mind that the function of this petition is not to rehear the case or decide the merits.

The admission or rejection of the contract did not prevent the defendant from showing the highest and best use of his land and at the most it was merely a minor piece of corroborative evidence the exclusion of which is not such a substantial injustice as to amount to an impairment of the obligation of that contract in violation of Section 10, Article I of the Constitution of the United States or a deprivation of the petitioner's property without due process of law in violation of the Fourteenth Amendment to the Constitution of the United States.

The testimony showed that the agreement was speculative; speculative both as to the probability of completing the assemblage it called for, and speculative as to whether it was still a valid agreement of sale at the time of the taking; because of its inherent limitations it was no more than an offer which is never received as evidence of value.

It is therefore respectfully submitted that for the reason set forth above, the petition for writ of certiorari should be denied.

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